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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 756.

CHARLES DAVIS, PLAINTIFF IN ERROR,

vs.

THE ELMIRA SAVINGS BANK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FILED JULY 16, 1894.

(15,640.)

THE LAW ASSOCIATION —OF— PHILADELPHIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 18, 1894.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the court of appeals of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, being the highest court of law or equity of the State of New York in which a decision could be had in the suit between The Elmira Savings Bank, plaintiff, and Charles Davis, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision
2 was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Charles Davis, as by his complaint appears, we, being willing that error, if any hath been, should be duly
3 corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so you have the same at Washington within thirty days from the day of signing the citation, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville Weston Fuller, Chief
4 Justice of the said Supreme Court, the fifteenth day of June, in the year of our Lord one thousand eight hundred and ninety-four.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States for the Northern District of New York.

Allowed by—
R. EARL,
Acting Chief Judge of the Court of Appeals of New York.

5 [Endorsed:] Charles Davis, plaintiff in error, against The Elmira Savings Bank, defendant in error. Writ of error.

6 Know all men by these presents that we, William V. Reynolds, of Schaghticoke, and William Foster, Jr., of number 146 Broadway, New York, all in the State of New York, are held and firmly bound unto The Elmira Savings Bank, in the county of Chemung, New York, in the just and full sum of three thousand dollars, to be paid to the said The Elmira Savings Bank, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated seventh day of June, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a sitting of the court of appeals of New York, at Saratoga Springs, in a suit depending in the said court between the said The Elmira Savings Bank and one Charles Davis, a judgment was rendered against the said Charles Davis, and the said Charles Davis being about to procure a writ of error and file a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Elmira Savings Bank, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Charles Davis shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make his plea
7 good, then the above obligation to be null and void; otherwise to be and remain in full force and virtue.

WM. FOSTER, JR. [SEAL.]
WM. V. REYNOLDS. [SEAL.]

Signed, sealed, and delivered in presence of—
As to Wm. Foster, Jr.—
W. B. PUTNEY.

As to Wm. V. Reynolds—
THEO. H. ENIS.

Approved.
R. EARL,
Acting Chief Judge of the Court of Appeals of New York.

A true copy of the bond taken by the chief judge on allowing the writ of error and on file in this office.

W. J. DOOLITTLE,
Clerk U. S. Circuit Court, Northern District of New York.

Endorsed: Filed 21 June, 1894.

8 STATE OF NEW YORK, *ss:*

And now here the judges of the court of appeals of New York make return of this writ by annexing hereto and sending herewith, under the seal of the court of appeals of New York, a true and at-

tested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

9 STATE OF NEW YORK, *ss:*

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our court of appeals, sitting at Saratoga Springs, on the fifth day of June, one thousand eight hundred and ninety-four, it is thus contained, the following being the entire record in the case:

On the seventh day of February, in the year of our Lord one thousand eight hundred and ninety-four, the appellant, the above-named Charles Davis, came here into our court of appeals, by William A. Beach, his attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the gen-
10 eral term of the supreme court of New York in the fourth judicial department, and The Elmira Savings Bank, the respondent in the said action, afterwards appeared in the said court of appeals by Herendeen and Mandeville, its attorneys; which said notice of appeal and the return thereto annexed are as follows:

11 Supreme Court.

Supreme Court, Chemung County.

THE ELMIRA SAVINGS BANK, Plaintiff,
against
CHARLES DAVIS, as Receiver of the Elmira National Bank, Defendant.

The following question in difference between the Elmira savings bank, a domestic savings bank corporation, of Elmira, New York, and Charles Davis, of Binghamton, New York, of full age, as receiver of the Elmira National bank, a national bank corporation, of Elmira, New York, is hereby submitted to the supreme court of the State of New York, to be tried and determined by the general term of the fourth judicial department of the State of New York, to wit:

Whether the said The Elmira savings bank is entitled to recover judgment against the said Charles Davis, as receiver of the
12 Elmira National bank, for the sum of forty-two thousand seven hundred and four and sixty-seven hundredths ($42,704.67) dollars with interest thereon from May 23, 1893, as a preferred creditor of the said The Elmira National bank, with costs, recoverable out of any funds which may come into his hands as such receiver applicable thereto, and whether the said Charles Davis, as receiver of said national bank, shall, after the payment of its circulating notes, if it has any, has been provided for, apply all the property of the said national bank in the first place to the payment in full of any sum or sums of money deposited in said national bank by the said The Elmira savings bank, as provided under section 130 of the banking law of the State of New York, being chapter

689 of the Laws of 1892, or whether the said The Elmira savings bank shall be considered as a general creditor of the said The Elmira National bank, and entitled only to its *pro rata* dividend of the assets of the said The Elmira National bank.

The following case is agreed upon by said parties as containing a statement of the facts upon which the said controversy, hereby submitted, depends, and the case, submission, and affidavit herein *is* to be filed in the office of the clerk of the county of Chemung.

1. That at the times hereinafter mentioned, the said The Elmira savings bank was and still is a domestic savings bank corporation, organized and incorporated under and by virtue of the laws
13 of the State of New York, having its banking office in the city of Elmira, Chemung county, New York.

2. That the said The Elmira National bank is a bank organized under the sections of the Revised Statutes of the United Stats which authorizes the organization of national banking associations, approved June 22, 1874, and of subsequent acts in addition to and amendatory thereto, having its banking office in said city of Elmira, and that the said The Elmira National bank became insolvent, closed its doors, and ceased to transact business upon the 23rd day of May, 1893.

3. That the said Charles Davis heretofore and on the 24th day of May, 1893, was duly appointed receiver of the said The Elmira National bank, insolvent, by the Comptroller of the Currency of the United States, duly authorized thereto, and on the 2nd day of June, 1893, the said Charles Davis duly qualified and entered upon the discharge of the duties of his trust as such receiver, and said receivership is still pending undischarged, and the said Davis is in the possession of all the property of the said insolvent bank, as such receiver.

4. That upon the said 23rd day of May, 1893, the said The Elmira savings bank had on deposit and to its credit in the said The Elmira National bank, at the time when the same became insolvent, the sum of $42,704.67, the same having been deposited in said national bank in the usual course of business, and between the 1st day of November, 1890, and the 15th day of May, 1893, both
14 inclusive, and the amount of said deposit did not and does not exceed the amount authorized to be so deposited by the said The Elmira savings bank in the said The Elmira National bank by the provisions of chapter 689 of the Laws of 1892 of the State of New York.

5. That the payment of all the circulating notes of the said The Elmira National bank, insolvent, has been provided for.

6. That the said Charles Davis, as such receiver as aforesaid, has in his possession property of said insolvent bank, consisting of money, exceeding the amount of $42,704.67 and interest thereon from May 23, 1893.

7. That the said The Elmira savings bank has duly and upon June 7th, 1893, demanded from the said Charles Davis, as such receiver as aforesaid, the payment of said sum of $42,704.67 and interest thereon from said May 23, 1893, and that the said deposit be

recognized by said receiver as a preferred claim under section 130 of the State banking law of the State of New York, being chapter 689 of the Laws of 1892, and that said demand has been refused.

8. That an actual controversy exists at the time of this submission, between the said parties, upon the point hereby presented for decision.

Wherefore, plaintiff demands judgment that the said The Elmira savings bank recover judgment against the said Charles
15 Davis, as receiver of the said The Elmira National bank, insolvent, for the sum of $42,704.67 with interest thereon from May 23, 1893, and that said sum and interest be decreed a preferred claim to be paid in full out of the assets which have or may come into the hands of the said Charles Davis as such receiver as aforesaid, and for such other and further relief as to the court may seem just, equitable and proper together with costs and disbursements.

Defendant demands judgment that the said The Elmira savings bank be decreed to be a general creditor of the said The Elmira National bank and entitled only to its *pro rata* share of the assets which shall come into the hands of said Charles Davis, as such receiver as aforesaid with the other creditors of the said The Elmira National bank.

CHEMUNG COUNTY, *ss:*

Charles Davis, of Binghamton, New York, as receiver of the Elmira National bank, is one of the parties to the controversy stated in the foregoing case; that said controversy is real, and that the submission thereof is made in good faith for the purpose of determining the rights of the parties.

CHAS. DAVIS, *Receiver.*

Sworn to before me this 28th day of Aug., 1893.

[L. S.] FRANCIS J. BYRNE,
Notary Public.

In witness whereof, the parties hereunto have executed
16 the foregoing submission the 28 day of August, 1893. The said Charles Davis as receiver of the Elmira National bank by affixing his signature and seal hereto, and the said The Elmira savings bank by causing its corporate seal to be hereunto affixed, attested by the signatures of its vice-president and treasurer.

[L. S.] THE ELMIRA SAVINGS BANK.
THOMAS S. FLOOD, *Vice-president.*
E. L. WYCKOFF, *Treasurer.*
CHAS. DAVIS, [L. S.]
Receiver Elmira Nat. Bank.

CHEMUNG COUNTY, *ss:*

On the 28th day of August, 1893, before me the subscriber personally appeared Charles Davis, to me personally known, and

known to me to be the person who executed the foregoing instrument, and duly acknowledged the execution thereof.

[L. S.] FRANCIS J. BYRNE,
Notary Public.

STATE OF NEW YORK, }
County of Chemung, } *ss:*

On this 28 day of August, one thousand eight hundred and ninety-three, before me personally appeared Ernest L. Wyckoff, treasurer of the Elmira savings bank, to me known, and known to me to be the person who signed the foregoing instrument, and he acknowledged that he executed the foregoing instrument as such treasurer as aforesaid, and being by me duly sworn did depose
17 and say that he resides in the city of Elmira, in the State of New York, that he is the treasurer of the Elmira savings bank, that he knows the corporate seal of the said bank, and that the seal affixed to said instrument is such corporate seal, and that he fixed the said seal and subscribed his name to said instrument as such treasurer by authority of the board of trustees of the said The Elmira savings bank and pursuant to a resolution duly passed by the said board at a meeting thereof, and further says that he knows the signature of Thomas S. Flood, the vice-president of said bank, and that the signature to the foregoing instrument is the signature of the said vice-president, and that his name was affixed to the foregoing instrument by like order of the board of trustees.

[L. S.] CASSIUS A. PHILLIPS,
Notary Public.

(Endorsed:) Filed Aug. 28, 1893.

Supreme Court, Chemung County.

THE ELMIRA SAVINGS BANK, Plaintiff,
against
CHARLES DAVIS, as Receiver of the Elmira National Bank, Defendant.

Judgment of the 27th Day of December, 1893.

A case agreed upon between the parties above named, without action, pursuant to section 1279 of the code of civil proced-
18 ure, and duly verified on the 28th day of August, 1893, duly acknowledged by the parties hereto upon the same day, having been submitted to the court, and an order of the general term of the supreme court in the fourth department having been made herein upon the 21st day of November, 1893, and duly entered, directing that the plaintiff have judgment herein as hereinafter is adjudged.

Now, therefore, it is hereby adjudged and decreed pursuant to said order, that The Elmira Savings Bank, plaintiff, recover judgment against Charles Davis as receiver of the Elmira National bank, defendant, for the sum of forty-four thousand two hundred and

twenty-seven dollars and eighty cents ($44,227.80) damages, and ninety-eight (98) dollars and seventeen (17) cents ($98.17) costs, amounting in all to the sum of forty-four thousand three hundred twenty-five dollars and ninety-seven cents ($44,325.97), and that the same is hereby adjudged and decreed a preferred claim to be paid in full out of the assets which have or may come into the hands of the said receiver. And the said receiver is hereby directed to pay the same accordingly, or to certify the same to the Comptroller of the Currency of the United States to be paid in full as a preferred claim, in due course of administration, and that plaintiff have execution therefor.

(Endorsed:) "(Copy.) A. S. Fitch, clerk." "Filed Dec. 27, 1893."

19 Supreme Court.

THE ELMIRA SAVINGS BANK, Respondent,
against
CHARLES DAVIS, as Receiver of the Elmira National Bank, Appellant.

To Messrs. Herendeen & Mandeville, plaintiff's attorneys:

Take notice, that the above-named defendant hereby appeals to the court of appeals of the State of New York from the judgment, and every part thereof, entered upon the order of the general term of the supreme court, fourth department, in the above-entitled action, in the clerk's office of the county of Chemung on the 27th day of December, 1893, for $44,325.97.

Dated January 17th, 1894.

Yours, etc., WILLIAM A. BEACH,
Appellant's Attorney.

Office and P. O. address, 27 White Memorial building, Syracuse, N. Y.

(Endorsed:) Filed Jan. 17, 1894.

20 Supreme Court, General Term, Fourth Department.

THE ELMIRA SAVINGS BANK, Plaintiff,
against
CHARLES DAVIS, as Receiver of the Elmira National Bank, Defendant.

Submitted Sept., 1893. Decided Nov., 1893.

Hardin, P. J.; Martin and Merwin, JJ.

Submission of a controversy under sec. 1279 of the code of civil procedure.

The question in difference is stated in the submission as follows:

Whether the said The Elmira savings bank is entitled to recover

judgment against the said Charles Davis, as receiver of the Elmira National bank, for the sum of forty-two thousand seven hundred and four and sixty-seven hundredths ($42,704.67) dollars with interest thereon from May 23, 1893, as a preferred creditor of the said The Elmira National bank, with costs, recoverable out of any funds which may come into his hands as such receiver applicable thereto, and whether the said Charles Davis, as receiver of said national bank, shall, after the payment of its circulating notes, if it has any, has been provided for, apply all the property of the said national bank in the first place to the payment in full of any sum or sums of money deposited in said national bank by the said The Elmira savings bank, as provided under section 130 of the
21 banking law of the State of New York, being chapter 689 of the Laws of 1892, or whether the said The Elmira savings bank shall be considered as a general creditor of the said The Elmira National bank, and entitled only to its *pro rata* dividend of the assets of the said The Elmira National bank.

The following is the statement of the facts:

1. That at the times hereinafter mentioned, the said The Elmira savings bank was and still is a domestic savings bank corporation, organized and incorporated under and by virtue of the laws of the State of New York, having its banking office in the city of Elmira, Chemung county, New York.

2. That the said The Elmira National bank is a bank organized under the sections of the Revised Statutes of the United States which authorizes the organization of national banking associations, approved June 22, 1874, and of subsequent acts in addition to and amendatory thereto, having its banking office in the city of Elmira, and that the said The Elmira National bank became insolvent, closed its doors, and ceased to transact business upon the 23d day of May, 1893.

3. That the said Charles Davis heretofore and on the 24th day of May, 1893, was duly appointed receiver of the said The Elmira National bank, insolvent, by the Comptroller of the Currency of the United States, duly authorized thereto, and on the 2nd day of June, 1893, the said Charles Davis duly qualified and entered upon
22 the discharge of the duties of his trust as such receiver, and said receivership is still pending undischarged, and the said Davis is in the possession of all the property of the said insolvent bank, as such receiver.

4. That upon the said 23rd day of May, 1893, the said The Elmira savings bank had on deposit and to its credit in the said The Elmira National bank at the time the same became insolvent, the sum of $42,704.67, the same having been deposited in said national bank in the usual course of business, and between the 1st day of November, 1890, and the 15th day of May, 1893, both inclusive, and the amount of said deposit did not and does not exceed the amount authorized to be so deposited by the said The Elmira savings bank in the said The Elmira National bank by the provisions of chapter 689 of the Laws of 1892, of the State of New York.

5. That the payment of all the circulating notes of the said The Elmira National bank, insolvent, has been provided for.

6. That the said Charles Davis, as such receiver as aforesaid, has in his possession property of said insolvent bank, consisting of money, exceeding the amount of $42,704.67 and interest thereon from May 23, 1893.

7. That the said The Elmira savings bank has duly and upon June 7th, 1893, demanded from the said Charles Davis, as such receiver as aforesaid, the payment of said sum of $42,704.67 and interest thereon from said May 23, 1893, and that the said
23 deposit be recognized by said receiver as a preferred claim under section 130 of the State banking law of the State of New York, being chapter 689 of the Laws of 1892, and that said demand has been refused.

8. That an actual controversy exists at the time of this submission between the said parties upon the point hereby presented for decision.

The plaintiff demanded judgment for the amount of its claim and that it be decreed a preferred claim to be paid in full out of the assets, and for such other and further relief as to the court may seem proper, with costs.

The defendant demanded judgment that the plaintiff be decreed to be a general creditor and entitled only to its *pro rata* share of the assets with the other creditors.

Herendeen & Mandeville, for plaintiff; William A. Beach, for defendant.

MERWIN, *J.*:

By sec. 130 of the banking law (chap. 689 of the Laws of 1892) it is provided as follows:

"SECTION 130. Debts due savings banks from insolvent banks preferred. All the property of any bank or trust company which shall become insolvent, shall after providing for the payment of its circulating notes, if it has any, be applied by the trustees, assignees or receiver thereof in the first place, to the payment in full of any sum or sums of money deposited therewith by any
24 savings bank, but not to an amount exceeding that authorized to be so deposited by the provisions of this chapter, and subject to any other preference provided for in the charter of any such trust company."

By sec. 118 of the same act, it is provided that the trustees of every savings bank "shall as soon as practicable invest the moneys deposited with them in the securities authorized by this article; but for the purpose of meeting current payments and expenses in excess of the receipts, there may be kept an available fund not exceeding 10 per centum of the whole amount of deposits with such corporation on hand or deposit in any bank in this State or of the United States, or with any trust company incorporated by any law of the State; but the sum so deposited in any one bank or trust

company shall not exceed 25 per centum of the paid-up capital and surplus of any such bank or company."

Provisions to the same effect existed in chap. 409 of the Laws of 1882, which was in force up to the passage of the act of 1892.

It is claimed on the part of the plaintiff that sec. 130 applies to national banks as well as State banks and was so intended by the legislature. This proposition does not seem to be disputed by the defendant. By sec. 118 authority was given to make deposits "in any bank in this State organized under any law of this State or of the United States." Sec. 130 refers to the same subject-matter and the design naturally would be to afford protection to all de-
25 posits authorized to be made. The expression used is "any bank." This is broad enough to cover national banks as named in the 118th section. The evident object and purpose of the provision would not be obtained unless it did cover them. Taking both sections together that is, I think, the fair construction.

Assuming then that the provision in question applies to national banks, is there any reason why it should not be operative?

The argument of the defendant's counsel is based mainly on the propositions that the State has no authority to exercise in this respect any control over national banks, and that the State legislation is inconsistent with the national legislation on the subject and therefore inoperative.

In "Waite *v.* Dowley," 94 U. S. 527, the question was whether the statute of a State was void as to national banks which required the cashier of each national bank within the State and the cashiers of all other banks to transmit to the clerks of the several towns in the State in which any stockholder of such bank resided a list of the names of such stockholders, the number of shares held by each and the amount actually paid in on each share. It was held that the law was valid, although Congress had legislated upon the subject in that it had required of each national bank that a list of its stockholders shall be kept posted up in some place in their business office. In the opinion of the court at page 533, it is said: "We have more than once held in this court that the national
26 banks organized under the acts of Congress are subject to State legislation is in conflict with some act of Congress, or where it tends to impair or destroy the utility of such banks as agents or instrumentalities of the United States, or interferes with the purposes of their creation. This doctrine was clearly and distinctly announced in 'National Bank *v.* Commonwealth,' 9 Wall., 353, and that case has often been referred to since with approval in this court."

In the case in 9 Wallace, it was held that a State law requiring the national banks to pay the tax which is rightfully levied on the shares of its stock is valid. It is there said, page 362, "that the agencies of the Federal Government are only exempted from State legislation so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that Government. Any other rule would convert

a principle founded alone in the necessity of securing to the Government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. * * * So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks
27 from discharging their duties to the Government that it becomes unconstitutional." This doctrine is reiterated in "Western Union Telegraph Company *v.* Massachusetts," 125 U. S. 551.

Applying these principles to the present case, it is difficult to see how the State act interferes with the utility of the national bank as an agent or instrumentality of the General Government. No possessory right is given until after the bank by reason of its insolvency has ceased to be of any utility as an agent or instrumentality of the Government, and after its circulating notes are provided for. The logic of the case in the 9th Wallace will uphold the law in question here unless it is in conflict with some provision of the United States statute on the subject.

Upon this line it is argued that the State act is in conflict with those provisions of the national act which provide for a *pro rata* distribution of the assets and prohibit preferences. Those provisions are sections 5236 and 5242 of the United States Revised Statutes, and are as follows:

"SEC. 5236. From time to time, after full provision has been made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to
28 him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such associations or their legal representatives, in proportion to the stock by them respectively held."

"SEC. 5242. All transfers of the notes, bonds, bills of exchange or other evidences of debt owing to any national banking association or of deposits to its credit; all assignments of mortgages, sureties on real estate or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with the view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void, and no

attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any State, county or municipal court."

In "Scott *v.* Armstrong," 146 U. S. 499, the ordinary doctrine of equitable set-off in case of insolvency was applied against the receiver of an insolvent national bank. It was there argued that the sections above quoted forbid it, because they required that after the
29 redemption of the circulating notes had been provided for, the assets should be ratably distributed among the creditors and that no preferences given or suffered, in contemplation of or after committing the act of bankruptcy should stand, and it was insisted that the assets of the bank existing at the time of its insolvency, included all its property, without regard to any existing liens or set-offs. To this the court say:

"We do not regard this position as tenable. Undoubtedly, any disposition by a national bank, being insolvent or in contemplation of insolvency, of its choses in action, securities or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; but liens, equities or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated. The provisions of the act are not directed against all liens, securities, pledges or equities, whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency. Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends, is to make them from what belongs to the bank, and that, which at the
30 time of the insolvency belongs of right to the debtor, does not belong to the bank."

In "Casey, receiver, *v.* La Societe de Credit Mobillier," 2 Woods 77, it was held that the preference of one creditor by a national bank, mentioned in sec. 5242 of the Revised Statutes, is a preference given to the creditor to secure or pay a pre-existing debt; that when a national bank receives a loan on condition that the lender shall be secured therefor and security is accordingly given by pledging a part of the assets of the bank, this is not a preference within the meaning of sec. 5242, although the bank is then in an embarrassed state; that the fact that the assets pledged were changed from time to time as they fell due and others substituted in their stead, according to the contract between the bank and the pledgee did not make the pledge of the substituted assets void; that the title of the receiver is the same as that of an assignee in bankruptcy and is subject to all equities.

In "Clark *v.* Iselin," 21 Wall., 360, it was held that the giving by a confession of judgment for* a debtor of A a consideration of equal value passing at the time is

[* Inserted and erased.]

not an act of bankruptcy though such confession be not entered of record but kept in the creditor's custody and its existence unknown to others. In the opinion it is said that the question whether a transfer of securities is a preference depends on whether it was a transfer of property for a present sufficient consideration, or was a transfer to satisfy or secure an antecedent debt or liability; that the fact, that years before the entry of the judgment the debtor contemplated the possibility that a judgment might be obtained, and by the confession of judgment put it in the power of the creditor to obtain one without his knowledge or subsequent assent, was wholly impertinent to the inquiry whether the debtor intended an unlawful preference at the time of the entry of the judgment, and that the intention at that date was the material question. In "Matter of Craft," 2 Benedict, 221, it is said by Judge Blatchford that the words "in contemplation of bankruptcy" as used in the act of 1867 mean, in contemplation of committing what was made by the act an act of bankruptcy, or of voluntarily applying to be decreed a bankrupt.

In the present case it must be presumed that the national bank, when from time to time it received the deposits from the savings bank, knew of the law which authorized such deposit and provided for the preference. The savings bank was not bound to deposit in that particular bank nor was the latter bound to receive the deposit. But if the one made and the other received the deposit, it must be assumed that both parties then intended that the security provided for by the statute should at the proper time be operative. There was then in effect a contract that if the deposit or loan was made, the security should be given. This was a part of the transaction in each case of deposit. It was not a case of a security for a prior indebtedness but it was a case where on each occasion a consideration passed of equal value with the security or right given. In this view and within the rulings in the cases above referred to, there was not a preference in violation of the provisions of sec. 5242.

By virtue of the State act and the conduct of the parties, the savings bank had at least an equitable lien which is effective within the principles laid down in "Scott *v.* Armstrong," and is not antagonistic to the *pro rata* distribution provided for in sec. 5236. The receiver took subject to any valid liens or equities. The bank that he represents received the deposits subject to the condition imposed by the State statute, and whether it be said that a trust was impressed or a lien imposed, the statute bound the bank and its assets when they passed to the receiver, and interferred with no rights of the Government. The principles laid down in the Scott case are quite applicable and justify the claim of plaintiff to a preference. The right of the plaintiff to a preference was preserved within the principles laid down in that case, and was not therefore in conflict with the national law.

The foregoing considerations lead to the conclusion that the plaintiff is entitled to judgment against the defendant for the amount claimed and that the same be decreed a preferred claim to

be paid in full out of the assets which have or may come into the hands of the said receiver, and be paid by said receiver or by him certified to the comptroller to be paid as a preferred claim in due course of administration.

33 Hardin, P. J., and Martin, J., concur.

Judgment for the plaintiff as stated in the opinion with costs.

STATE OF NEW YORK, }
Chemung County, Clerk's Office, } *ss:*

I, David N. Heller, clerk of said county, and of all the courts of record thereof, (except the surrogate's court) do hereby certify that I have compared the foregoing annexed copy of submission, judgment-roll and notice of appeal in the case of The Elmira Savings Bank against Chas. Davis, receiver, &c., with the originals thereof now on file in this office, and that the same is a true transcript of said originals, and of the whole thereof, and the endorsements thereon.

In witness whereof, I have hereunto set my hand and [L. S.] official seal at Elmira, N. Y., this first day of February, 1894.

DAVID N. HELLER, *Clerk.*

34 Whereupon the court of appeals, having heard this cause argued by Mr. Charles H. Peck and Mr. Edward Winslow Paige, of counsel for the appellant, and by Mr. Edward G. Herendeen, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the general term of the supreme court appealed from in this action be in all things affirmed.

And it was further ordered and adjudged that the respondent recover against the appellant costs of the appeal to this court.

Therefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

35 On the thirtieth of June was filed the following citation, with proof of service:

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Elmira Savings Bank, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of New York, wherein Charles Davis is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error men-

tioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert Earl this twenty-first day of June, one thousand eight hundred and ninety-four.

R. EARL,
Acting Chief Judge of the Court of Appeals of New York.

Service admitted by attorney twenty-ninth of June, 1894.

(Endorsed:) Filed June 30, 1894.

37 On the thirteenth day of July, 1894, was filed the following assignment of errors, to wit:

The Supreme Court of the United States.

CHARLES DAVIS, Plaintiff in Error,
against
THE ELMIRA SAVINGS BANK, Defendant in Error.

Assignment of Errors.

Afterwards, to wit, on this twenty-first day of June, in the year of our Lord one thousand eight hundred and ninety-four, comes the said Charles Davis, by Edward Winslow Paige, his attorney, and says that in the record and proceedings in the above-entitled matter there is a manifest error, in this, to wit:

1. That under the provisions of section 5236 of the Revised Statutes of the United States the defendant in error is entitled
38 to its ratable proportion of such dividends as shall be made by the Comptroller of the Currency on all such claims as shall be or have been proved to the satisfaction of said comptroller or adjudicated in a court of competent jurisdiction, and it is entitled to no more; but by the judgment in the above matter it has been adjudged that the defendant in error is entitled to the whole of its claim in preference of all other claims.

2. That under the provisions of the aforesaid section 5236 of the Revised Statutes of the United States every claimant against the Elmira National bank whose claim has been or shall be proved to the satisfaction of the Comptroller of the Currency or has been or shall be adjudicated in a court of competent jurisdiction is or will be entitled to his ratable proportion of every dividend to be
39 made by the comptroller from the assets of the said Elmira National bank, and the plaintiff in error is entitled to pay over all monies to the Comptroller of the Currency for that purpose; but by the judgment below it is adjudged that he pay such monies first of all to the defendant in error to the full amount of its claim.

3. Section 138 of chapter 689 of the Laws of New York of the year 1892 is, so far as this matter is concerned, in conflict with the aforesaid section 5236 of the Revised Statutes of the United States, and is therefore unconstitutional and void; but by the judgment below it is adjudged that the said section of the law of New York is

valid, notwithstanding the provisions of the said section 5236, and that by virtue of a right set up under the said law of New
40 York the defendant in error is entitled to recover the whole of its claim, notwithstanding that by the provisions of said section 5236 the Comptroller of the Currency is required to pay to every other claimant whose claim has been proved or adjudged as aforesaid his ratable proportion of the same monies.

4. That the supreme court of New York and the court of appeals of New York have no jurisdiction to decide in favor of a right or title set up under section 130 of chapter 689 of the Laws of New York of 1892 as against section 5236 of the Revised Statutes of the United States, but by their judgments in this matter both courts have done so.

5. The judgment below is that the defendant in error recover of the plaintiff in error $44,227.80, with interest and costs, whereas it should have been in favor of the plaintiff in error that the
41 defendant in error recover only its ratable or *pro rata* share of the assetts which should come into the hands of the plaintiff in error as receiver of the Elmira National bank.

Fifteenth of June, 1894.

EDWARD WINSLOW PAIGE,
Attorney for Charles Davis, Plaintiff in Error,
44 *Cedar Street, New York.*

On the thirteenth day of July, 1894, was filed the following opinion of the court of appeals, which had been filed with the reporter on the fifth of June, 1894:

42 THE ELMIRA SAVINGS BANK, Respondent,
v.
CHARLES DAVIS, as Receiver, etc., Appellant.

(Decided June 5, 1894.)

Chas. H. Peck and Edward Winslow Paige for appellant.
Edward G. Herendeen for respondent.

GRAY, *J.:*

The defendant is the receiver of an insolvent national bank and the plaintiff, a savings bank created under the laws of this State, claims, with respect to its deposits theretofore made with the former, to be entitled to be preferred in payment, under section 130 of the banking law of this State. (Laws of 1892, chap. 689.) The circulating notes have been provided for and all other conditions of the banking law have been complied with, so as to entitle the claim to be allowed, if not in conflict with the provisions of the national banking law. The State banking law permits the trustees of savings banks to keep an "available fund * * * on hand or deposit in any bank in this State, organized under any law in this State or of the United States," etc., etc. (§ 118.) Section 130 provides as follows:

"All the property of any bank or trust company which shall be-

come insolvent shall, after providing for the payment of its circulating notes, if it has any, be applied by the trustees, assignees or receiver thereof in the first place to the payment in full of any sum or sums of money deposited therewith by any savings bank, but not to an amount exceeding that authorized to be so deposited by the provisions of this chapter, and subject to any other preference provided for in the charter of any such trust company."

The sole contention is whether this provision can be given effect in the distribution of the property of insolvent national banks. The appellant insists that it conflicts with certain provisions of the national banking law; which were framed to prohibit preferences, and relies upon the following sections of the Revised Statutes of the United States.

"§ 5236. From time to time, after full provision has been made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

"§ 5242. All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all
43 deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void, and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any State, county, or municipal court."

The provisions of the Federal law as to national banks constitute a complete system for their establishment, government and winding up. (Cook Co. Nat. Bank *v.* United States, 107 U. S. 445.) As agencies of the Government, in the administration of a branch of the public service, the States are without authority to exercise any control over them, or to affect their operation, (except so far as Congress may permit); where the legislation will conflict with the national law, or will tend to impair or destroy their utility and efficiency in performing the functions, by which they are designed to serve the Government. (National Bank *v.* Commonwealth, 9 Wall. 353; Farmers' National Bank *v.* Dearing, 91 U. S. 33; Waite *v.* Dowley, 94 *id.* 527; Western Union Tel. Co. *v.* Mass., 125 *id.* at p.

551.) If the State banking law, in these provisions which we are considering, comes into conflict with the operation of the Federal law, the former must be held ineffectual to impede the due execution of the latter, in all respects therein intended and provided for. Is that the case here? We are not now concerned with questions of the propriety or justice of the State law, in directing the claims of savings banks to be preferred in payment over those of other depositors. That is the law of the State, enacted by its legislature in furtherance of the protection and security designed to be afforded to the savings of the people and if the inhibition of section 5242 of the U. S. Revised Statutes does not extend so far as to prevent its operation in such a case, it must be given its full effect. That effect would be to preserve and enforce a right or preference, which had accrued to the savings bank in making deposits of its funds with the national bank, and which will be deemed to have been in the contemplation of the parties and assented to. Their contractual relations were necessarily influenced and shaped by the provisions of this public law; which gave to that class of depositors a superior claim or lien to that of other depositors or creditors upon the property of the bank. Are these provisions for security against a possible loss of the deposits of savings banks inconsistent with that equal distribution among creditors, which was intended by the national law to be effectuated, when the amount of insolvency arrived? The language of section 5242 does not seem to convey that idea, in providing that "all payments of money to either," (*i. e.* shareholders or creditors) "made after the commission
44 of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void." In Corn Exchange Bank *v.* Blye (101 N. Y. 303), it was said by this court of this section that "it specifically prohibits all transfers of the corporate property made with a view to preferences and so protects the creditors from any voluntary act of the bank, which selects out favored individuals for payment." It is a transfer of property, or a payment of moneys, in contemplation of insolvency, in order to give a preference to the creditor, which the law condemns. Its policy is to secure equality of distribution of the assets among creditors; but it was not intended that, in the distribution, rights lawfully acquired and superior equities should be disregarded and annulled. But we have upon this question a very recent and emphatic declaration by the United States Supreme Court, in the case of Scott *v.* Armstrong (146 U. S. 499). In that case, the question related to the right, of one who was a debtor to a national bank, to an equitable offset, as against its receiver; appointed by the Comptroller of the Currency to close up its affairs for insolvency. Sections 5236 and 5242 were relied upon as forbidding it; because of their requirements that there should be a ratable disposition among the creditors and that there should be no preference given or suffered, in contemplation of, or after committing the act of insolvency. Chief Justice Fuller,

delivering the opinion of the court, said: "We do not regard this position as tenable. Undoubtedly any disposition by a national bank, being insolvent or in contemplation of insolvency, of its choses in action, securities or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; but liens, equities or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated. The provisions of the act are not directed against all liens, securities, pledges or equities, whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency. Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends, is to make them from what belongs to the bank, and that, which at the time of the insolvency belongs of right to the debtor, does not belong to the bank."

This is very explicit language and must be regarded as controlling upon us, as a construction placed by the highest Federal court upon these provisions of the national banking law. In that case and in those of Waite *v.* Dowley and National Bank *v.* Com-
45 monwealth we have authoritative expressions of opinion from which to imply the doctrine, that State legislation in regulation of the general conduct of the business of the national bank with its depositors is not an interference with any exercise of the governmental power. If in the course of its business, through force of State laws, rights are accorded to, or liens are acquired by, depositors or creditors, they are not within the purview of sections 5236 or 5242. The distinction between what is legislation by the State which conflicts with the national banking law and what is a constitutional exercise of State legislative power in relation to national banks, is found by considering whether it assails or affects the independence of the national bank, in the performance of its functions as an agency of the General Government. With respect to its contracts, its rights and remedies, they may, in general, be subject to, or based upon, State legislation, without impairing their efficiency as national institutions. (Western Union Co. *v.* Massachusetts, *supra.*) It is the voluntary act of the national bank, in contemplation of its insolvency and with the view of then preventing the ratable application of its insolvency and with the view of then preventing the ratable application of its property, which is avoided by the national law. In the present case, while a going concern, it entered into an engagement with the savings bank, which the State law required and regulated; which vested in the latter superior rights or equities, and which, in the possible event of future insolvency, would give to it a prior claim to payment from the assets. When that event happened and the receiver was appointed, he took over the property of the insolvent concern, as

trustee for its creditors and shareholders, under the same conditions as the bank held it and subject to the right of this plaintiff to be first paid in full, before other creditors were paid.

I think the judgment of the general term below was right and that it should be affirmed, with costs.

All concur, except Earl and Peckham, JJ., not voting.
Judgment affirmed.
A copy.

H. E. SICKELS,
Reporter C.

46 STATE OF NEW YORK:

COURT OF APPEALS, CLERK'S OFFICE.

I, Gorham Parks, clerk of the court of appeals of the said State of New York, do hereby certify that I have compared the annexed copy of the record and proceedings, of the bond filed upon the granting of the writ of error, of the opinion of the court of appeals, of the assignment of errors, and of the citation, with proof of service, all in the case of The Elmira Savings Bank against Charles Davis, as receiver of the Elmira National bank, with the originals and the copy bond and opinion on file in this office, and that the same are correct transcripts therefrom and of the whole of said originals and copies, and, further, that the writ of error annexed is the original writ awarded by the Honorable Robert Earl, acting chief judge of the court of appeals.

Seal State of New York Court of Appeals.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this thirteenth day of July, A. D. 1894.

GORHAM PARKS, *Clerk.*

[Endorsed:] Charles Davis, plaintiff in error, against The Elmira Savings Bank, defendant in error. Writ of error and return. Edward Winslow Paige, att'y for pl'ff in error, 44 Cedar street, N.Y. city.

Endorsed on cover: Case No. 15,640. New York court of appeals. Term No., 756. Charles Davis, plaintiff in error, *vs.* The Elmira Savings Bank. Filed July 16th, 1894.

Office Supreme Court, U. S.
FILED.
FEB 27 1895
JAMES H. McKENNEY,
CLERK.

OCTOBER TERM. 756.

SUPREME COURT OF THE UNITED STATES.

CHARLES DAVIS, PLAINTIFF IN ERROR,

against

THE ELMIRA SAVINGS BANK, DEFENDANT IN ERROR.

BRIEF

FOR PLAINTIFF IN ERROR.

Page

SUPREME COURT OF THE UNITED STATES.

CHARLES DAVIS, Plaintiff in Error,
against
THE ELMIRA SAVINGS BANK, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Abstract or Statement of the Case.

The sole question involved is whether deposits, made in New York, by savings banks in National banks are preferred above the other deposits and the claims of the other creditors in the event of the insolvency of the National bank.

The solution of the question turns upon the effect to be given to the portions of the Act of Congress and Law of New York next quoted.

Sections of the Revised Statutes of the United States preceding 5236 provide for the appointment by the Comptroller of the Currency of a receiver of the property of an insolvent National bank; for the conversion, by the receiver, of that property into money and the payment of the money into the Treasury to the credit of the Comptroller.

Section 5236 is in the following words:

"Sec. 5236. From time to time, after full provision has been "first made for refunding to the United States any deficiency "in redeeming the notes of such association, the Comptroller "*shall make a ratable dividend* of the money so paid over to "him by such receiver *on all such claims as may have been* "*proved to his satisfaction or adjudicated in a court of com-*"*petent jurisdiction*, and, as the proceeds of the assets of such "association are paid over to him, shall make further divi-"dends on all claims previously proved or adjudicated; and the "remainder of the proceeds, if any, shall be paid over to the "shareholders of such association, or their legal representa-"tives in proportion to the stock by them respectively held."

The full text of these sections is given in Appendix I, *post*. p. I.

Section 130 of Chapter 689 of the laws of New York of 1892, is in the following words:

"§119. DEBTS DUE SAVINGS BANKS FROM INSOLVENT BANKS PREFERRED.—*All the property* of any bank or trust company "which shall become insolvent, *shall*, after providing for the "payment of its circulating notes, if it has any, *be applied "by the trustees, assignees or receiver thereof in the first "place to the payment in full of any sum or sums of money "deposited therewith by any savings bank*, but not to an "amount exceeding that authorized to be so deposited by the "provisions of this chapter, and subject to any other preference "provided for in the charter of any such trust company."

The full text of the laws of New York on this subject is given in Appendix II, *post* p. iv.

The enactments of Congress and the laws of New York being in this state the defendant in error lodged moneys on ordinary deposit with the Elmira National Bank; the latter bank became insolvent and the plaintiff in error was appointed receiver on the twenty-fourth of May, 1893. At that time the account of the defendant in error showed a balance in its favor of $42,704.67.

The question is whether *each* depositor and creditor is entitled to his *ratable* proportion of *all* the property, pursuant to the Act of Congress; or whether the defendant in error is entitled to be paid its *whole* deposit *in preference of all other depositors*, pursuant to the Law of New York.

The manner in which the question is raised is this: Pursuant to Section 1279 of the Code of Civil Procedure of New York, the defendant in error and the plaintiff in error submitted to the Supreme Court of New York at a General Term of that Court in the Fifth Department a statement of the above facts and the above question in difference. That court, resolving the above question in difference in the favor of the defendant in error, rendered judgment in its favor for the $42,704.67 and interest.

The plaintiff in error appealed to the Court of Appeals of New York, which affirmed the judgment.

A writ of error sued out by Davis, the receiver, has brought the judgment of the Court of Appeals, and the record, here.

Specification of the Error.

The error relied on is in adjudging that *the simple command* laid upon the receiver and upon the receiver *only*, by the law of New York, *to apply the whole of the property* to the payment of the claim of the defendant in error, is to be obeyed by that receiver, in the face of the wholly contradictory command laid upon the same receiver by the Act of Congress to apply to the payment of the claims of *all* the claimants *each* his *ratable* proportion of the *same property*.

The Act of Congress and the Law of New York are alike in this. Each is a command to the winding-up officer to distribute the assets in a certain way. *Neither is anything more.*

The Law of New York commands the "trustees, assignees "or receiver"

These are the possible kinds of w nding-up officers known to the laws of New York as will be shown presently.

to apply *all* of the property to the payment of the savings bank. In this particular case it commands Davis, the receiver, to apply all of the property to the payment of the savings bank.

The Act of Congress commands Davis, the receiver, to pay everything to the Comptroller. And it commands the Comptroller to divide it ratably among all the depositors and all the creditors.

Of course both commands cannot possibly be obeyed. It is a part of the same money which the Law of New York says must be paid to the defendant in error which the Act of Congress says must be paid to the other depositors and creditors.

If there were the smallest difference between the Act and the Law; if there were any other or additional provision, there might be something to found an argument upon. But there is absolutely not anything in either, except the simple command to the winding-up officers to apply the property, in the one case all to the savings bank—in the other case ratably to all creditors.

The Act and the Law give contradictory commands and are not reconcilable.

The Court of Appeals of New York put its judgment upon the ground that the lodging of money by the savings bank, made *then*, by virtue of the Law of New York, a contract between the two banks that the savings bank should be paid in full "in the possible event of future insolvency." (Page 19.)

It is submitted that this cannot possibly be so, since the Law contains no reference to the bank. It refers only to assets which *had been of the bank, but had got into the hands of the winding-up officer for distribution.*

Let it be assumed, however, that it is so. The holding then is this. The lodging of moneys with a bank, while there is in existence a law which simply commands a winding-up officer to apply the assets to the repayment of those moneys in a certain proportion, *makes a contract between the bank and the depositor that they shall be so applied and the assets pass into the hands of the winding-up officer subject to the conditions of that contract.*

But if this be so, then the lodging of the money by the savings bank and its acceptance by the National bank, *made*, in view of of the Act of Congress then as now in force, *a contract that the savings bank should only receive its ratable proportion of the assets.* For the Act of Congress, then as now existing, is just as explicit in its command to the winding-up officer as to what he shall do with the property as is the Law of New York.

Furthermore *it follows* that the lodging of moneys by the other depositors made, in view of the Act of Congress, a contract between each of them and the bank, that each should get *his ratable* share of the property.

The defendant in error lodged its money with the bank and the bank took it. Neither need have done so unless it had chosen to do so.

Each depositor lodged his money with the bank and the bank took it. Neither need have done so unless he or it had chosen to do so.

The circumstances, as well as the laws, are thus exactly alike.

It remains to endeavor to satisfy the court that the words "trustees, assignees or receiver" describe simply all the different sorts of winding-up officers known to the Laws of New York.

Of course, so far as this case is concerned, the only one word of the three words used is the word "receiver," and that describes the plaintiff in error. But it is just as well to show, what it is submitted is the fact, that the intention of the framers of the law was that it should apply to the different sorts of winding-up officers, and only to such officers.

As early as 1811 a law was enacted in New York which provided that upon the dissolution of a corporation the directors or managers should become trustees of its property for the benefit of its creditors and stockholders.* At the time of the passage of that act there was not any such thing in New York as the receiver of the property of a corporation,† and the common law was still in force whereby, upon the death of a corporation its real estate reverted to the grantors, its personal property went to the sovereign, its debts were extinguished.*

This law went into the Revised Statutes in 1829, but provision having been made in 1825 for receivers of the property of corporations,† it was changed so as to make the directors or managers to be trustees only in case other persons should not have been "appointed by the legislature or by some court of "competent authority."* In this form it has ever since remained in force, and in the *Broadway Surface Case*, where the court of appeals held that a law under which a receiver of the property of the Broadway Surface Railroad Company had been appointed was unconstitutional, it also held that the directors at the time of the dissolution were trustees under this provision.

[*The full text of this law is given in Appendix III, *a*.]
[*See Appendix III, *a*.]
[†See Appendix III, *c*.]

People v. O'Brien, 111 N. Y., 1. 55-63. In that case the corporation had been killed by a direct act of the legislature.

The word "assignees" refers to assignees under assignments for the benefit of creditors. Such assignments by corporations are extremely rare, and are now indeed in most cases prohibited; but they are not by any means wholly unknown. Here are three instances. 1826, The Greene County Bank, *Haxtun v. Bishop*, 3 W R., 13; 1844. St. Peter's Church, *DeRuyter v. Trustees of St. Peter's Church*, 3 Barb. Ch., 119; 3 N. Y., 238; 1891, The North River Lumber Company, *Vanderpoel v. Gorman*, 140 N. Y., 563. (See Appendix III, *b*.)

The word receiver needs no explanation. The original law *authorizing it in New York* is given in Appendix III, *c*.

Banks of deposit in New York are managed by "directors."

It is respectfully submitted that the judgment should be reversed.

EDWARD WINSLOW PAIGE,

Of Counsel.

APPENDIX I.

ACTS OF CONGRESS.

1864, Chap. CVI.—"*An act to provide a National Currency, "secured by a Pledge of United States Bonds, and "to provide for the Circulation and Redemption thereof.*"

By section 47 of that act, (13 Stat. at Large, 114) it was provided that the circulating notes of banking associations organized under it, should, upon default of the association, be redeemed by the United States; "whereupon said comptroller "may, in his discretion, cancel an amount of bonds pledged by "such association equal at current market rates, not exceeding "par, to the notes paid."

"And for any deficiency in the proceeds of the bonds "pledged by such association, when disposed of as hereinafter "specified, to reimburse to the United States the amount so "expended in paying the circulating notes of such association, "the United States shall have a first and paramount lien upon "all the assets of such association; and such deficiency shall be "made good out of such assets in preference to any and all "other claims whatsoever, except the necessary costs and "expenses of administering the same."

"SECTION 50. *And be it further enacted*, That on becoming satisfied, as specified in this act, that any association has "refused to pay its circulating notes as therein mentioned, and "is in default, the comptroller of the currency may forthwith "appoint a receiver, and require of him such bond and security "as he shall deem proper, who, under the direction of the "comptroller, shall take possession of the books, records, and "assets of every description of such association, collect all "debts, dues, and claims belonging to such association, and, upon "the order of a court of record of competent jurisdiction, may "sell or compound all bad or doubtful debts, and, on a like order, "sell all the real and personal property of such association, on "such terms as the court shall direct; and may, if necessary "to pay the debts of such association, enforce the individual "liability of the stockholders provided for by the twelfth section of this act; and such receiver shall pay over all money "so made to the treasurer of the United States, subject to the "order of the comptroller of the currency, and also make "report to the comptroller of the currency of all his acts and "proceedings. The comptroller shall thereupon cause notice "to be given, by advertisement in such newspapers as he may "direct, for three consecutive months, calling on all persons "who may have claims against such association to present the "same, and to make legal proof thereof. And from time to

"time the comptroller, after full provision shall have been first "made for refunding to the United States any such deficiency "in redeeming the notes of such association as is mentioned in "this act, shall make a ratable dividend of the money so paid "over to him by such receiver on all such claims "as may have been proved to his satisfaction or adjudi- "cated in a Court of competent jurisdiction; and from time to "time, as the proceeds of the assets of such association shall "be paid over to him, he shall make further dividends, as "aforesaid, on all claims previously proved or adjudicated; "and the remainder of such proceeds, if any, shall be paid "over to the shareholders of such association, or their legal "representatives, in proportion to the stock by them respec- "tively held."

REVISED STATUTES OF THE UNITED STATES 1874.

"SEC. 5229. Immediately upon declaring the bonds of an "association forfeited for non-payment of its notes, the "Comptroller shall give notice, in such manner as the Secretary "of the Treasury shall, by general rules or otherwise, direct, "to the holders of the circulating notes of such association, to "present them for payment at the Treasury of the United "States; and the same shall be paid as presented in lawful "money of the United States; whereupon the Comptroller "may, in his discretion, cancel an amount of bonds pledged by "such association equal at current market rates, not exceeding "par, to the notes paid.

"Sec. 5230. Whenever the Comptroller has become satis- "fied, by the protest or the waiver and admission specified in "section fifty-two hundred and twenty-six, or by the report "provided for in section fifty-two hundred and twenty-seven, "that any association has refused to pay its circulating notes, "he may, instead of canceling its bonds, cause so much of them "as may be necessary to redeem its outstanding notes to be sold "at public auction in the city of New York, after giving "thirty days' notice of such sale to the association. For any "deficiency in the proceeds of all the bonds of an association,

"when thus sold, to reimburse to the United States the amount "expended in paying the circulating notes of the association, "the United States shall have a paramount lien upon all its "assets; and such deficiency shall be made good out of such "assets in preference to any and all other claims whatsoever, "except the necessary costs and expenses of administering the "same."

"Sec. 5234. On becoming satisfied, as specified in sections "fifty-two hundred and twenty-six and fifty-two hundred and "twenty-seven, that any association has refused to pay its cir- "culating notes as therein mentioned, and is in default, the "Comptroller of Currency may forthwith appoint a receiver, "and require of him such bond and security as he deems "proper. Such receiver, under the direction of the Comptroller, "shall take possession of the books, records, and assets of "every description of such association, collect all debts, dues, "and claims belonging to it, and, upon the order of a court of "record of competent jurisdiction, may sell or compound all "bad or doubtful debts, and, on a like order, may sell all the "real and personal property of such association, on such terms "as the court shall direct; and may, if necessary to pay the "debts of such association, enforce the individual liability of "the stockholders. Such receiver, shall pay over all money so "made to the Treasurer of the United States, subject to the "order of the Comptroller, and also make report to the Comp- "troller of all his acts and proceedings."

"Sec. 5236. From time to time, after full provision has "been first made for refunding to the United States any defic- "iency in redeeming the notes of such association, the Comp- "troller shall make a ratable dividend of the money so paid "over to him by such receiver on all such claims as may have "been proved to his satisfaction or adjudicated in a court of "competent jurisdiction, and, as the proceeds of the assets of "such association are paid over to him, shall make further divi- "dends on all claims previously proved or adjudicated; and the "remainder of the proceeds, if any, shall be paid over to the "shareholders of such association, or their legal representatives, "in proportion to the stock by them respectively held."

(The second edition of the Revised Statutes of the United States, 1878, has the same words, figures and numbers of sections.)

APPENDIX II.

LAWS OF NEW YORK RELATING TO DEPOSITS BY SAVINGS BANKS.

CHAPTER 214, LAWS 1865.

Page 349. "An Act relating to deposits by savings banks."

"Section 1. It shall be lawful for the trustees of banks for "savings, who are authorized to make temporary deposits in "any of the incorporated banks, or in the associations which "now are or hereafter may be formed under the general banking "law, to make such deposits with any of the banks called "national banks, which now are or hereafter may be organized "according to Laws of the United States, or of this State, or of "both."

CHAPTER 689, LAWS 1892—Ch. 37, G. L.

2, 1898. "§118. AVAILABLE FUND FOR CURRENT EXPENSES "HOW LOANED.—The trustees of every such corporation "(savings bank) shall as soon as practicable invest the moneys "deposited with them in the securities authorized by this "article; but for the purpose of meeting current payments "and expenses in excess of the receipts, there may be kept an "available fund not exceeding ten per centum of the whole "amount of deposits with such corporation, on hand or deposit "in any bank in this state organized under any law of this "state or of the United States, or with any trust company incor- "porated by any law of the state; but the sum so deposited "in any one bank or trust company shall not exceed twenty- "five per centum of the paid-up capital and surplus of any "such bank or company."

2, 1898. "119. TEMPORARY DEPOSITS.—Every such cor- "poration may also deposit temporarily in the banks or trust "companies specified in the last section, the excess of current "daily receipts over the payments, until such time as the same "can be judiciously invested in the securities required by this "article."

2, 1903. "§130. DEBTS DUE SAVINGS BANKS FROM INSOL- "VENT BANKS PREFERRED.—All the property of any bank or "trust company which shall become insolvent, shall, after

"providing for the payment of its circulating notes, if it has "any, be applied by the trustees, assignees or receiver thereof "in the first place, to the payment in full of any sum or sums of "money deposited therewith by any savings bank, but not to an "amount exceeding that authorized to be so deposited by the "provisions of this chapter, and subject to any other prefer- "ence provided for in the charter of any such trust company."

APPENDIX III.

LAWS OF NEW YORK CLAIMED TO DEFINE WORDS "TRUSTEES, ASSIGNEES OR RECEIVER" IN § 130, CHAP. 689, LAWS 1892.

a. "*Trustees.*"

(6 Webster, 321) "Chap. CCXXXV, (Laws 1811).

"An Act for the relief of the Creditors of Corporations created "by any Law of this State.

Passed April 9, 1811.

"*Be it enacted by the people of the state of New York, represented in Senate and Assembly*, That upon the dissolution "of any corporation already created or which may hereafter be "created by any law of this state, the president and directors, "or the managers of the affairs of the said corporation at the "time of its dissolution, by whatsoever name they may be known "in law, shall be the trustees of such corporation, with full "power to settle the affairs, collect the outstanding debts and "divide the monies and other property among the stockholders, "after paying the debts due and owing by such corporation at "the time of its dissolution, as far as such monies and property "shall enable them.

"II. *And be it further enacted*, That the persons constituted "trustees as aforesaid shall have authority to sue for and re-"cover the aforesaid debts and property by the name of the "trustees of such corporation, describing it by its corporate "name, and shall be suable by the same name, or in their own "names and individual capacities, for the debts owing by such "corporation at the time of its dissolution, and shall be jointly "and severally responsible for such debts to the amount of the "monies and property of such corporation at the time of its "dissolution."

This Act had the tremendous effect of preserving the property of a corporation; abrogating the common law rule that at the death of a corporation all its real estate reverted to the grantors; all its personal property went to the crown; all its debts were extinguished.

It has since been followed all over the world.

It went into the Revised Laws of 1813 in the same words. I. R. L., 248.

1 Revised States (1829) p. 600, § 9, Tit. 3, Chap. 18, Pt. 1.

"§ 9. Upon the dissolution of any corporation created or to "be created, and unless other persons shall be appointed by the "legislature, or by some court of competent authority, the "directors or managers of the affairs of such corporation at the "time of its dissolution, by whatever name they may be known "in law, shall be the trustees of the creditors and stockholders

"of the corporation dissolved, and shall have full power to "settle the affairs of the corporation, collect and pay the out- "standing debts, and divide among the stockholders the monies "and other property that shall remain, after the payment of "debts and necessary expenses."

"§ 10. The persons so constituted trustees, shall have "authority to sue for and recover, the debts and property of "the dissolved corporation, by the name of the trustees of such "corporation, describing it by its corporate name, and shall be "jointly and severally responsible to the creditors and stock- "holders of such corporation, to the extent of its property and "effects that shall come into their hands."

b. "*Assignees.*"

It was early adjudged in New York that an artificial as well as an human being could make an assignment of its property in trust, for its creditors.

So held in case of a bank, Haxtun v. Bishop, 3 W. R., 13.

Since then many statutes have been passed regulating assignments for the benefit of creditors, and for the most part, of later years, corporations have been prohibited from making that sort of assignment.

But it is still good when made by a foreign corporation. *Vanderpool v. Gorman, 140 N. Y., 563*, and therefore such an assignment by a National bank would still be good in New York so far as its laws are concerned.

In practice it is exceedingly rare.

c. "*Receiver.*"

As early as 1817 Chancellor *Kent* held that the jurisdiction of his court did not extend to the sequestration of the property of corporations by means of receivers, or to the winding up of their affairs, and, substantially, that his court had no control over them

Attorney General v. Utica Insurance Company, 2 J. C. R., 371.

On the 28th of March, 1825, Attorney General *Talcott* applied to Chancellor *Sandford* for an injunction against the Bank of Niagara, but Chancellor *Sandford* held as Chancellor *Kent* had previously held.

Attorney General v. Bank of Niagara, Hopk., 354, 596.

Mr. *Attorney* (2 Sand. Ch., 266) thereupon prepared the "Act "to prevent fraudulent Bankruptcies by Incorporated Com-

"panies, to facilitate proceedings against them, and for other "purposes;" which was passed the twenty-eighth of April of "the same year. (Laws 1825, p. 448.)

Sections five and seventeen of that act were as follows:

"V. *And be it further enacted*, That whenever a judg- "ment shall be obtained at law against any incorporated com- "pany, and an execution issued thereon shall be returned "unsatisfied in part or in the whole, it shall be lawful for the "court of chancery, and for the several courts of equity having "jurisdiction, upon petition of the person or persons obtaining "such judgment, his or their representatives, and upon due "proof of the facts, to sequestrate the stock, property, choses "in action, and effects of such company, and to appoint a re- "ceiver of the same, and to distribute the same equally and in "a just proportion among the fair and honest creditors of such "company; and for that purpose, the said courts may compel "a discovery of such stock, property, choses in action, and "effects, by any officer, agent, or stockholder of such com- "pany, or by any other person."

"XVII. *And be it further enacted*, That it shall and may "be lawful for the attorney-general of this State, and it is "hereby made his duty, whenever any incorporated bank is "insolvent and unable to pay its debts, or has violated any of "the provisions of the act incorporating such company: and also "it shall be lawful for any creditor of any such company to "apply, by petition, to the court of chancery, setting forth the "facts and circumstances of the case; and upon its being proved "to such court that such company is insolvent, or that it has "violated any of the provisions of the act incorporating such "company, or of any other act which shall be binding on such "company, it shall and may be lawful for such court to issue "an injunction to restrain such company and its officers from "exercising any of the privileges or franchises granted by the "act incorporating such company, or by any other act, and "from collecting or receiving any debts, and from paying out, "or in any way transferring any of the monies or effects of "such company, until such court shall otherwise order; and it "shall be lawful for such court to appoint a receiver of the "property, monies and effects of said company, and to distri- "bute the same among the fair and honest creditors thereof."

In regard to this and subsequent legislation in New York, the Court of Appeals said in *U. S. Trust Co., v. N. Y. W. Sh. & B. Rw. Co.*, 101 N. Y., 478, as follows:

(P. 483) "It was held at an early day in this State, that the "jurisdiction of chancery did not extend to the sequestration "of the property of a corporation by means of a receiver, or to "the winding up of its affairs, or to control or restrain the "usurpation of franchises by corporate bodies, or by persons

"claiming without right to exercise corporate powers. (*Attor-
"ney General v. Utica Ins. Co.*, 2 Johns, Ch. 371; *Attorney-
"General v. Bk. of Niagara*, Hopk., 354). The refusal of the
"Court of Chancery to entertain jurisdiction of corporate bodies,
"at the instance of creditors, or to wind up their affairs in
"case of insolvency, led to the enactment by the legislature in
"1825, of the act chapter 325 of the laws of that year, entitled
"'An Act to prevent fraudulent bankruptcies of incorporated
"companies, and to facilitate proceedings against them,' etc.
"By this act jurisdiction was conferred upon the Court of
"Chancery to sequestrate the property of a corporation, upon
"the application of a judgment creditor, after the return of an
"execution unsatisfied, and to appoint a receiver of its prop-
"erty (§ 15*), and in case of an incorporated bank, which had
"become insolvent, or had violated its charter, it authorized
"the Court of Chancery, upon the petition of the attorney-
"general, or of a creditor, to proceed by injunction and
"to appoint a receiver of the property of the bank,
"and to distribute the same among its creditors, (§ 17).
"The provisions of the act of 1825, enlarged and ex-
"tended, were incorporated into the Revised Statutes, in the
"article entitled 'Of proceedings against corporations in
"'equity' (2 R. S., 462), and a complete statutory system was
"enacted for the winding up of the affairs of a corporation
"against which an execution had been returned unsatisfied, at
"the instance of the creditor in the execution and for similar
"proceedings against insolvent banking or other specified cor-
"porations, at the instance of the attorney general, or any
"creditor or stockholder (§§ 36, 39, 40, 41). The court was
"authorized to appoint receivers of the corporate property.
"Their powers and duties are specified in the statute in great
"detail, and it is declared that receivers so appointed shall be
"'vested with all the estate, real and personal, of such cor-
"poration,' and they are declared to be 'trustees of such estate,
"'for the benefit of the creditors of such corporation, and its
"'stock holders,' (2 R. S., 469, §§ 67, 68). The system
"inaugurated by the Act of 1825, and incorporated into the
"Revised Statutes, has been continued by the Codes, and for
"fifty years prior to the Act of 1883, had been the statutory
"system of procedure for the winding up of the affairs of
"insolvent corporations, through receivers appointed by the
"court, not by virtue of its inherent jurisdiction, but under
"statutory authority, the statute which authorized their
"appointment, also prescribing with great minuteness their
"powers and duties.

The Act of 1825 was copied in New Jersey the next year, and has since been followed over pretty much the whole world.